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Federal Communications Commission
Office of the Secretary

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April 22, 1991

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MM Dkt. 92-51

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: In the Matter of Petition for Declaratory
Ruling That Lenders May Take a Limited
Security Interest in an FCC License, MMB
File No. 910221A

Dear Ms. Searcy:

Attached for filing are an original and nine
(9) copies of the comments of Heller Financial, Inc.
submitted in response to the public notice issued in the
above-captioned proceeding.

If you have any questions on this matter,
please do not hesitate to contact me at (202) 371-7170.

Thank you.

Sincerely,

Thomas J. Casey
Thomas J. Casey

Attachments

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)	
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Petition for Declaratory Ruling)	MMB File No. 910221A
That Lenders May Take a Limited)	
Security Interest in an FCC)	
License)	
)	
and)	and
)	
In the Matter of)	
)	
Seller Financing)	MMB File No. 870921A
of Broadcast Station Transfers)	

COMMENTS OF HELLER FINANCIAL, INC.

Of Counsel:

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April 22, 1991

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SUMMARY

Heller Financial, Inc. ("Heller") is a major lender to companies in the communications industry, including companies licensed by the Federal Communications Commission ("Commission").*

Heller supports the goals of the Petition for Declaratory Ruling filed by Hogan & Hartson (the "Petition").** The Commission should clarify that licensees may borrow against the full value of their businesses, just like any other commercial borrower, by explaining that federal communications law and policy permits lenders to take "limited" security interests in Commission licenses or in the overall going-concern value of licensees including as one component the value that may be added to the licensee by virtue of its license (the "Intangible Operating Value" of the license).*** Alternatively, Heller requests that the Commission clarify that federal communications law and policy do not preclude courts from finding that a senior creditor's secured interest includes the going-concern value of the licensee including the Intangible Operating Value of the license or the license itself.

-
- * Over the course of the last five years, in approximately 22 transactions, Heller has provided an aggregate of over \$600 million to numerous companies in the communications industry.
 - ** Heller is not commenting on the petition for declaratory ruling filed by Crowell & Moring regarding seller financing.
 - *** A "limited" security interest would not allow creditors to take possession or control of Commission licenses or require the Commission to modify the way it discharges its transfer of control responsibilities or otherwise involves itself between licensees and their lenders.

A. Lenders Need Acceptable Levels of Risk to Be
Able to Finance Licensees

From an economic perspective, lenders must provide financing on a secured basis, and in practice, certain loans most likely would not have been made in the past and will not be made in the future to the same extent if lenders can rely only on a licensee's hard assets as security for the recovery of their loans. Lenders, until recently, have generally been able to assess the risks of financing in the communications industry with some certainty. Lenders have considered a licensee's cash flow, whether or not it is attributable to the holding of a license. The Commission, on its part, has implicitly recognized the secured lender's position in this regard and allowed secured lenders to realize upon the full value of licensees through the use of trustees and receivers.

From a business perspective, communications borrowers require financing for myriad purposes, including funds for facilities, equipment and services investments, as well as for ongoing working capital needs. These borrowers look to communications lenders such as Heller to satisfy such basic necessary financing requirements.

In today's economic climate, licensee receiverships and bankruptcies are becoming more commonplace. Creditors of licensees junior in interest to senior secured creditors, and even the licensees themselves, have begun to search for means by which to attack the benefit of the bargain struck with senior secured creditors during more congenial economic times so that such junior creditors and licensees can obtain a greater share of the proceeds

available to creditors. Unfortunately, the lack of clarity in the Commission's view of the historical scheme of third-party lender financing of the communications industry has contributed to several recent bankruptcy decisions where innocent third-party lenders were manifestly deprived of the benefit of their secured bargain.

Much confusion has arisen through a recent court decision, In re Oklahoma City Broadcasting, Co.,* which held that going-concern value may not be relied upon as security by a secured lender, at least in some circumstances, when the borrower holds a Commission license.** This confusion must be dispelled expeditiously to prevent potentially significant disruption in the communications industry due to a large-scale shortfall of financing available to communications borrowers.

B. The Public Interest Requires the Commission to Clarify its Policies to Prevent Significant Disruption in the Communications Lending Market and Licensee Industries

Specific Commission recognition of the permissibility of security interests in relation to Commission licenses, whether in the license itself or in the going-concern value of the licensee including the Intangible Operating Value of the license captured in proceeds of a sale of the licensee as a going concern, would be a

* 112 B.R. 425 (Bankr. W.D. Okla. 1990) ("Oklahoma City").

** Oklahoma City creates the aberrational result that unsecured creditors may be virtually guaranteed monetary distributions on their claims while the senior lender's secured financing claim is frustrated by the incongruous limitation on the security interest to the value of hard assets alone.

step towards supporting a realistic market environment for working capital and assist third-party lenders financing Commission licensees.*

The currently increased marketplace confusion and uncertainty may be of great detriment to the public because it could result in a severe reduction of available financing for licensees. This would limit licensees from investing in new technologies and improvements to their facilities and reduce the pool of potential licensees. Minority broadcasters in particular may face increased difficulty in obtaining financing in a market artificially restricted by potential lenders reluctantly making the prudent business decision that large loans secured only by the hard assets of a licensee may not constitute safe and sound banking practices.

Appropriate clarification of the Commission's position (1) will encourage lenders to continue to finance licensees and potential licensees, knowing that they can support the financial business plans of licensees while relying upon the going-concern value of the licensee, and (2) will not divest the Commission of its authority to review and approve licensees or offend the Communications Act in any manner whatsoever.

* Security interests or similar mechanisms are permitted subject to administrative agency regulation in other regulated rights such as liquor licenses and airport landing slots, thus providing support for the financing market in these regulated industries.

C. The Requested Clarification Fully Complies
With the Communications Act and Does Not
Abrogate the Commission's Authority

The type of limited security interest discussed here, whether in the license or in the going-concern value of the licensee including the Intangible Operating Value of the license captured in the proceeds of a sale of the licensee as a going concern, is not prohibited by the Communications Act or United States Supreme Court interpretations thereof. While the Commission has in the past made broad statements against allowing security interests in licenses, an analysis of Commission precedent demonstrates that these statements were actually dicta; the policy behind the holdings in these cases and the general public interest support limited security interests that do not compromise the Commission's authority to approve all licensees.

A ruling contrary to that sought by the Petition or as proposed herein would have a material adverse effect on the public. Such a ruling could effectively eliminate the informal Commission-recognized system of communications industry financing that depends in part on a secured creditor's well-founded understanding that its security interest includes the intangible going-concern value of the licensee and the use of trustees and receivers to preserve this going-concern value of licensees.

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COMMENTS OF HELLER FINANCIAL, INC.

Heller Financial, Inc. ("Heller") respectfully submits these comments in response to the Notice of Petition for Declaratory Ruling on the permissibility of security interests in Federal Communications Commission ("FCC" or "Commission") licenses.¹ These comments are

¹ Petition for Declaratory Ruling That Lenders May Take a Limited Security Interest in an FCC License, MMB File No. 910221A (filed Feb. 21, 1991) ("Petition"); Notice of Petitions for Declaratory Ruling (rel. Mar. 15, 1991). Heller is not commenting on the other petition for declaratory ruling placed on public notice by the Commission in conjunction with this Petition. Motion for Declaratory Ruling on Seller Financing of Broadcast Station Transfers, MMB File No. 870921A (filed Sept. 21, 1987) ("Crowell & Moring Petition"). Heller does not oppose the request contained in the Crowell & Moring Petition, and Heller recognizes that any action by the FCC to increase the availability of financing for licensees
(Footnote continued)

intended to provide additional information on current market conditions facing licensees and communications industry lenders for the Commission to determine the best course of action in the public interest.

1. INTRODUCTION

Heller strongly supports the goals of the Petition because uncertainty has arisen concerning the scope of the FCC's existing policy regarding the position of secured creditors of FCC licensees that warrants immediate clarification.² The Commission has long held that the Communications Act of 1934 prohibits (1) non-licensees from assuming direct or indirect control of a license without prior approval, and (2) licensees from treating licenses as bestowing property rights in the frequency. However, the Commission recognizes that licenses are valuable in the marketplace, and that valuable consideration may be exchanged for licensed facilities in

(Footnote 1 continued from previous page)

is in the public interest. However, Heller, as a third-party lender, will limit its comments to the area in which it is most knowledgeable.

² The Commission's rules specifically authorize the Commission to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.

excess of the market value of the licensee's hard assets. Licensees use the total value of their businesses, including as one component value that may be attributable to their licenses ("Intangible Operating Value" of the license), to raise the debt and equity capital necessary to offer the most competitive services to the public. Lenders, in making lending decisions regarding potential licensee-borrowers, rely on that total value offered by the licensees.

The Petition's request, and Heller's request herein, ask the Commission only to clarify specifically that licensees may borrow against the full value of their businesses, just as any other commercial borrower may do. Heller does not ask the Commission to grant any rights to creditors to take possession or control of FCC licenses or to modify the way the Commission discharges its transfer of control responsibilities or otherwise involves itself between licensees and their lenders. Indeed, Heller is only requesting that the Commission prevent unforeseen applications of communications law by non-communications courts which potentially may have adverse effects on the public interest.

At least one court,³ unfamiliar with the statutory basis for the Commission's policy and apparently unaware of the potential impact of its decision on the communications industry and the Commission's implicitly-recognized practice, has apparently extended the rule from one preventing property treatment of wavelength and unauthorized control of licenses to one that reduces dramatically the value of licensees upon which secured creditors may rely. This has led to great confusion and uncertainty regarding the enforceability of numerous existing loan and security agreements. Moreover, the spread of such misguided decisions will clearly reduce the amount of capital that is available to the broadcast

³ In re Oklahoma City Broadcasting Co., 112 B.R. 425 (Bankr. W.D. Okla. 1990) ("Oklahoma City"). See also Stephens Industries v. McClung, 789 F.2d 386 (6th Cir. 1986) ("Stephens"); In re Smith, 94 B.R. 220 (Bankr. M.D. Ga. 1988) ("Smith"). Both the Stephens and Smith courts apparently relied on FCC dicta without full analysis in not recognizing the secured party's interest relating to FCC licenses. However, the FCC cases relied upon should not have been read so broadly. See Section 4.3 below. Thus, even before Oklahoma City there was some confusion among courts as to the application of federal communications law and policy to bankruptcy situations. However, the apparent trend towards progressively more confused court decisions as bankruptcy courts struggle with unfamiliar communications policy has increased the existing risk for lenders to what is fast approaching an unacceptable level from a prudent business perspective.

and other licensed industries. Such a development would disserve the public by inhibiting, among other things, (1) investment in facilities, (2) introduction of new services and technologies, and (3) the efficiency-enhancing effects that the normal marketplace can produce.

1.1. The Financing Process

Licensees regularly require infusions of funds for a variety of reasons, including start-ups, acquisitions, and working capital. Not only must facilities be maintained, but with rapidly evolving technology, upgrades must be made to remain competitive. Retained earnings and outside investment in the licensee are not always adequate sources of capital; licensees must often look to independent third-party lenders. Reasonable leverage of available equity capital supporting the communications industry is vital to the continuing health of the industry.

1.1.1. Commercial Lending Decisions

Commercial lenders review proposed loan transactions from a business perspective and consider the strengths and risks of both the individual borrower and the borrower's industry. Lenders also assess, among

other things, the value of the borrower's assets and collateral. In the vast majority of communications industry cases, a potential licensee-borrower would not be able to obtain the funds it needs based on the value of its hard assets only. The borrower's cash-flow situation and its future earnings stream must also be considered for the lender to justify the risk of providing financing. But if, as the Oklahoma City court apparently determined, a licensee-borrower's earnings stream is considered to be incapable of serving as security because it is the product of an FCC license, then licensees would be unable to obtain the funds they need. Simply put, the value that a license brings to the licensee's facilities is very significant (1) to the borrower as a going concern with respect to its ability to obtain necessary financing, and (2) to the secured lender in evaluating the collateral which will secure any loan made to the licensee.

1.1.2. The Effect of Increased Risk on the Lending Process

The introduction of increased confusion and uncertainty into this evaluative collateral process by

Oklahoma City⁴ and similar cases exacerbates the problems caused by present economic conditions, which are already making it more difficult for licensees and potential licensees to obtain the funds necessary to begin or maintain operations or to improve service. In the past, when the market was thriving, the existence of some risks was mitigated by other strengths of the licensee-borrowers. Today, with increasing numbers of licensees facing financial difficulties, the confusion and uncertainty of existing FCC policy statements and recent court decisions have become more important to, and have potentially adverse effects upon, lenders, licensees, and the public.

Potential lenders hesitate to finance licensees when the market value of the licensee's operations is uncertain. If a large component of that market value may suddenly be eliminated as a source of satisfaction for loans in default or bankruptcy, there will be extreme reluctance among lenders to provide new financing to licensees.

This uncertainty also provides disincentives for lenders to participate in troubled licensee debt restructurings because lenders may not be able to estab-

⁴ 112 B.R. 425.

lish security sufficient to approximate the actual debt. Existing procedures in the event that a licensee-debtor defaults and a voluntary restructuring plan is not agreed upon may require that a court order a sale of the licensed facilities or transfer the licensed facilities to a trustee or receiver for disposition if the debtor enters bankruptcy. The FCC tries to act expeditiously in these cases to approve transfers, but where additional judicial proceedings are required there may be delay in the resolution of the borrower-licensee's impaired situation. Such delay is particularly harmful from the public's perspective because it prevents the license from being held by a qualified party that intends to operate the licensed facility over the long term. In addition, the present confusion and uncertainty may leave creditors unable to establish the right to post-petition accrual of interest or priority as to the proceeds of the sale or liquidation of the licensed operations.

Heller urges the Commission to clarify that, at least for purposes of dealing with licensees in default, a lender that has bargained for and obtained seniority in relation to other creditors can assert a limited security interest in (1) the license as the means to obtain a security interest in the going-concern value of the li-

censee, or (2) in the entire value of the licensee as a going concern, including the Intangible Operating Value of the license. This ensures that senior debt can be secured by, and satisfied from, the entire market value of the licensee. In the alternative, Heller asks that the FCC at least clarify that federal communications law and policy would not preclude a court from finding that such security interests may exist for contract or bankruptcy purposes. In no case would such a limited security interest compromise the FCC's transfer approval process or otherwise offend the Communications Act.

1.2. Description of Heller

Heller was incorporated in 1919 and is engaged in various aspects of commercial finance. Heller lends primarily on a secured basis to middle-market borrowers, and its clients typically have a high degree of financial leverage.

Heller's overall business as an institutional lender comprises over \$7 billion. Heller services over 6,000 borrowers. In the 1980s, Heller's communications business involved over \$1 billion. Today, however, the market as a whole is experiencing financial problems,

causing licensees to have to restructure their debts through either consensual workouts or bankruptcy.⁵

Heller's analysis of the strengths and risks of individual licensees and the industries where licensees are concentrated has evolved with the changing market situation. However, the introduction of added uncertainty regarding its ability to establish clear priority in the proceeds of the sale of a borrower's license as part of the going concern, whether through a security interest in the license or in the going-concern value of the licensee including the Intangible Operating Value of the license as captured by proceeds from sale of the licensee as a going concern, negatively impacts Heller's analysis of collateral and valuation issues related to a proposed transaction. The possible uncertainty and delay related to present restructuring and/or bankruptcy proceedings also negatively affect Heller's assessment of realistic and prudent exit strategies should the licensee-borrower default.

⁵ See "Financial Workouts: Growing Fact of Life in the '90s," Broadcasting 65, 66 (Oct. 15, 1990) ("30-40% of radio transactions completed between 1985 and 1989 have hit severe financial difficulties").

2. THE EFFECT OF EXISTING INTERPRETATIONS OF FCC
PRECEDENT EXACERBATES PRESENT MARKET CONDITIONS,
CREATING A NEED FOR EXPEDITIOUS CLARIFICATION OF
THE FCC'S POSITION

2.1. Present Market Conditions Have Reduced Funds
Available to Licensees

There is currently a slowdown in broadcast lending. In the past, values of licensees generally increased from year to year, and there was no shortage of credit for licensees. Loans to FCC licensees increased steadily in number and in amount through the 1980s. Thus, whether or not the FCC actually prohibited security interests in licenses had little practical significance because lending parties generally were not required to resort to their security interests to recover their loans. In addition, the FCC appeared implicitly to recognize that lenders must be permitted to rely on the market values of licensees and regularly approved transfers, both voluntary and involuntary, as necessary to protect innocent creditors. Moreover, such transfers were often to receivers or trustees the lenders assisted in selecting.

The current economic recession has led to increased numbers of borrowers missing interest payments, otherwise defaulting on their debts, and/or seeking rehabilitation under Chapter 11 of the United States Bank-

ruptcy Code.⁶ Moreover, the market value of licensees has been decreasing in some cases and has plateaued in others. Lenders are increasingly wary of providing financing in such an environment.⁷

⁶ See Paper, "Monday Memo," Broadcasting 15 (Mar. 11, 1991) ("Bankruptcy. . . . More and more companies, including many broadcasting stations, are now contemplating the kind of financial nightmare that always seemed to happen to someone else. More competition, smaller pools of advertising dollars, increased costs, higher debt service and lower station values -- these and other factors are now making many broadcast station owners think about the unthinkable."); "Financial Workouts," Broadcasting 65, 66 (Oct. 15, 1990) ("Five years ago the prevailing thought was that you can't get hurt in broadcasting [Some] think [the present situation] is a temporary setback due to a bad economy and six months from now everything will be great. [The truth is] the 'new reality of the '90s' hasn't yet set in.").

⁷ See "Financial Workouts," Broadcasting 65-67 (Oct. 15, 1990) ("As more and more radio stations begin to miss interest and/or principal payments . . . banks increasingly are growing queasy with the intangible elements of broadcast lending Banks are finding that their access to collateral was not what they thought They're seeing more encumbrances than they expected.").

2.2. Oklahoma City in Particular Has Added Great Confusion and Uncertainty into the Communications Financing Market

As discussed above, the FCC has appeared implicitly to permit lenders to rely essentially on the Intangible Operating Value of a license as part of a going concern in making lending decisions. However, the bankruptcy court in Oklahoma City⁸ refused to evaluate the creditor's interest in an operating station as being equal to the station's going-concern value, even though the debt roughly equaled the going-concern value. Apparently, the court equated the station's going-concern value with the value of the license to the station and found that because the creditor did not have specifically a security interest in the borrower's license, the creditor's interest could not be assessed based on the licensee's going-concern value.⁹

⁸ 112 B.R. 425.

⁹ The court did note, however, that its evaluation of the security interest was only for the purposes of the creditor's motion to lift the automatic stay imposed by the bankruptcy court in order to foreclose and sell the debtor's assets. The creditor did not intend to keep the station operating as a going concern. The court suggested that if the creditor instead had been trying to assert priority in cram-down proceedings whereby the station would continue as a going concern, it might have considered going-concern value in evaluating the creditor's security interest. Id. at 429 n.5.

The confusion and uncertainty raised by Oklahoma City and similar cases,¹⁰ requires that the Commission clarify as expeditiously as possible that federal communications law and policy do not prevent courts from determining that a creditor's security interest includes the debtor-licensee's going-concern value.

2.3. The Confusion and Uncertainty Raised by Oklahoma City, Combined with Current Market Conditions, Could Have a Harmful Effect on FCC Licensee Financing

The uncertainty regarding the scope and impact of the Commission's policy will become more significant as licensees rely on bankruptcy court protection more often because of present market conditions. With only questionable ability to rely specifically on the full value of licensees, lenders will soon require licensees to demonstrate increased equity and other collateral in order to provide funds. Minority licensees and investors, in particular, may find it very difficult to refinance or acquire licensed facilities when there is a shortage of credit because of these additional requirements.¹¹

¹⁰ See n.3 above.

¹¹ The Commission has long demonstrated its concern for increasing the number of minority broadcasters.
(Footnote continued)

Prompt Commission clarification of the meanings of its policies will affect the outcome of current and prospective bankruptcies and liquidations as well as encourage lenders to finance restructurings and new acquisitions in the future. Clearly, if a lender's interests, including its interest in a borrower's intangible assets associated with the borrower's FCC license, are not fully recognized, lenders will see little benefit in participating in workouts. Licensees would be forced to cease operation when their physical assets are foreclosed upon, thus depriving the public of service.

Timely resolution of the security interest issue thus will have significant impact on the financial

(Footnote 11 continued from previous page)

See, e.g., Policy Regarding the Advancement of Minority Ownership in Broadcasting, 57 R.R.2d 855 (1985) ("Minority Ownership"); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). In Minority Ownership, the Commission considered, but decided against, allowing sellers of stations to minority interests to retain reversionary interests in the license in order to encourage seller financing of such transactions. Minority Ownership was decided in 1985, however, during a period when station values were increasing, and the FCC believed that adequate protections for seller-creditors existed such that a reasonable source of financing was available to minority buyers. Moreover, the FCC stated that it would "welcome" the opportunity to consider protective mechanisms for "potential seller-creditors." 57 R.R.2d at 858.